RECENT DECISIONS.

AGENCY—TRAVELING SALESMAN—AUTHORITY TO DRAW DRAFTS.—The plaintiff was accustomed to cash drafts drawn on the defendant by the latter's traveling salesman. These drafts were paid by the defendant during a period of six years. An action was brought on similar drafts indorsed by the plaintiff and dishonored by the defendant. *Held,* that the defendant's salesman had no authority to draw drafts, and that the defendant was therefore not liable. *Seattle Shoe Co.* v. *Packard* (Wash. 1906) 86 Pac. 845.

Generally speaking, a drummer is only authorized to solicit orders for goods, *Chambers* v. *Short* (1883) 79 Mo. 204, but a more extended authority may be presumed from general usage, *Meyer* v. *Stone* (1885) 46 Ark. 210, or by estoppel from the acts of the principal. *Harris* v. *Simmerman* (1876) 81 Ill. 413. Where a principal without protest honors the drafts of his drummer for traveling expenses during a period of years, he represents to the person cashing such drafts that he will continue to honor them, and upon this representation such person may rely. The court in the principal case refused to find that the plaintiff relied upon this representation because the evidence showed that the plaintiff had confidence in the personal integrity of the drummer, a fact which would seem not decisive.

BAILMENTS—STOREKEEPER'S LIABILITY FOR CUSTOMER'S CLOTHING.—Plaintiff entered defendant's clothing establishment to buy a waistcoat. Having approached a salesman whom he knew, but who was waiting on another customer, he was told to wait on himself until the salesman was disengaged. He took off his waistcoat, laid it on the counter, and tried on others. Turning again to his own, he found that it and its contents had disappeared. *Held,* he could not recover against the proprietor of the establishment. *Wamser* v. *Browning, King & Co.* (N. Y. 1907) 79 N. E. 861.

It is well settled that one who invites another on his premises for the benefit of both, must keep the premises in a safe condition. *Donaldson* v. *Wilson* (1886) 60 Mich. 86. In the law of bailments there has been a corresponding development. One who invites another to lay aside chattels on his premises, to further their mutual business, must exercise care over these chattels. This is applied in case of a clothing-store keeper, *Bunnell* v. *Stern* (1890) 122 N. Y. 539; *Woodruff* v. *Painter* (1892) 150 Pa. St. 91, sleeping-car company, *Lewis* v. *Sleeping Car Co.* (1887) 143 Mass. 267, Turkish-bath proprietor, *Bird* v. *Everard* (N. Y. 1893) 4 Misc. 104, and restaurateur. *Buttman* v. *Dennett* (N. Y. 1894) 9 Misc. 462; *Simpson* v. *Rourke* (N. Y. 1895) 13 Misc. 230. The principal case does not attack these rules, but bars a recovery on the ground that the loss was due to plaintiff's own negligence. *Whitney* v. *Palace Car Co.* (1887) 143 Mass. 243. The fuller statement of facts in the opinion of the lower court, *Wamser* v. *Browning, King & Co.* (N. Y. 1905) 109 App. Div. 53, would not seem to warrant this as against the jury's verdict. *Walsh* v. *Railway & Navigation Co.* (1881) 10 Ore. 250.

CONFLICT OF LAWS—CONDITION LIMITING TIME OF BRINGING ACTION—NOT ENFORCED IN FOREIGN STATE WHERE PROVISION INVALID.—A contract of carriage executed and to be performed in Arkansas, provided that action was to be brought within six months of the loss. This stipulation was valid by the law of Arkansas, but would have been invalid in Texas where suit was brought. *Held,* the condition would not be enforced. *St. Louis, I. M. & S. Ry. Co.* v. *Hambrick* (Tex. 1906) 97 S. W. 1072.

The court assumes that the condition is merely a matter of limitation, which, since it goes to the remedy, is governed by the *lex fori*. But such a stipulation states the condition on which the carrier consents to be bound, and is not in any way a statute of limitations imposed to secure peace to the commonwealth. *Riddlesbarger* v. *Hartford Ins. Co.* (1868) 7 Wall. 386; *Fullam* v. *N. Y. Ins. Co.* (Mass. 1906) 7 Gray 61; *Ripley* v. *Ins. Co.* (1863) 30 N. Y. 136. As the contract was executed and to be performed in a foreign state, and as neither injury to the state enforcing the contract nor to its citizens would result, the condition should have been enforced. *Greenwood* v. *Curtis* (1810) 6 Mass. 358; *Hill* v. *Spear* (1870) 50 N. H. 253; *Brown* v. *Browning* (1886) 15 R. I. 422. Even considered as a pure limitation, since the purpose of the condition was to determine all liability, it should have been enforced by analogy to foreign statutes of limitation where these nullify the right as well as bar the remedy. *Baker* v. *Stonebrake* (1865) 36 Mo. 338; *Brown* v. *Parker* (1871) 28 Wis. 21.

CONFLICT OF LAWS—DOMICILE OF WIFE—HUSBAND INSANE.—In a suit to restrain collection of taxes assessed upon her, as a "resident," for the years 1894 to 1899 inclusive, the complainant proved that she had removed from the county and state in 1886, when her husband was adjudged insane and incarcerated in an asylum, and had done everything to acquire a new domicile, had she capacity to do so. *Semble,* she had capacity to change her domicile. *McKnight* v. *Dudley* (1906) 148 Fed. 204.

The court refers to *Haddock* v. *Haddock* (1905) 201 U. S. 562, 571, 583, on page 571 of which is found the vague and unnecessarily broad statement that a wife "may acquire a separate domicile whenever it is necessary or proper that she should do so," quoting from *Cheever* v. *Wilson* (1869) 9 Wall. 108, 124. For the extent to which this right has been actually sustained by decisions see 6 COLUMBIA LAW REVIEW 354. In case of the husband's confinement for insanity or imprisonment the wife's domicile remains that which the husband had before confinement or imprisonment, until she actually changes it. Whether she may do so seems never to have been decided. The case of *McPherson* v. *Housel* (N. J. 1860) 2 Beasley 35, frequently cited as to the effect of husband's imprisonment, is not in point. For a well-reasoned discussion, unsupported by cases, see Minor, Conflict of Laws § 49.

CONTRACTS—INSTALLMENTS—DUPLICITY.—Plaintiff sued for installments due under an installment building contract together with damages for the defendant's wrongful refusal to allow future performance by the plaintiff. *Held,* the declaration was demurrable for duplicity. *Milske* v. *Steiner Mantel Co.* (Md. 1906) 63 Atl. 471.

This decision is directly in accord with the position taken in 6 COLUMBIA LAW REVIEW 584, criticising the usually accepted view that all claims due under a contract at the time suit is brought, constitute one cause of action.

CONTRACTS—INTEREST ON UNLIQUIDATED DAMAGES FOR BREACH.—Defendant repudiated liability for loss of goods which it had insured, and put an end to the determination of the amount of the loss, the method of determination being provided for by the policy. *Held,* that interest on the amount due could be recovered from the time of repudiation. *Bernhard* v. *Rochester German Ins. Co.* (Conn. 1906) 65 Atl. 134.

The original rule was that interest could not be recovered on unliquidated damages for breach of contract, where the amount could not be made certain by mere calculation. *Speer* v. *Vanorden* (1810) 3 N. J. L. (2 Penning.) 652; *Gilpins* v. *Consequa* (1813) 10 Fed. Cas. No. 5452; *Willings* v. *Consequa* (1815) 30 Fed. Cas. No. 17766. The reason for the rule seems to be that where defendant could not tell how much he had to pay there was no default. 2 Sutherland Damages, 3d ed., § 347. In accord with this reason the rule was modified by *Van Renssalaer's Executors* v.

Jewett (N. Y. 1848) 5 Denio 135, to allow interest where the amount could be made certain by calculation on the basis of market value. This modification has been regularly followed. Some courts go further, and allow interest whenever the defendant has the means of finding out the amount due. *McMahon* v. *Ry. Co.* (1859) 20 N. Y. 463; *Kelly* v. *Fall Brook Coal Co.* (1867) 67 Barb. 183. Since, in the principal case, the means of determining the amount due was laid down by stipulations in the policy, the decision of the court comes within these decisions and the reason of the rule.

CORPORATION—FOREIGN—DEFECTIVE INCORPORATION—INABILITY TO PASS TITLE THROUGH WANT OF CORPORATE CAPACITY.—Plaintiff's assignor was a Kansas corporation chartered for the sole purpose of buying and selling real estate in Oklahoma, although corporations could not legally be organized for this purpose in Oklahoma. An action was brought on a note, part of the purchase price for real estate conveyed to the defendant by the corporation. *Held,* that the grantor being without corporate capacity, could not convey title to the defendant. *Lafferty* v. *Evans* (Okl. 1906) 87 Pac. 304.

The previous decision in *Myatt* v. *Ponca City L. & I. Co.* (1903) 14 Okl. 189, 68 L. R. A. 810, that the charter of incorporation of the land company in the principal case was insufficient to confer upon it any corporate capacity at all to do business in Oklahoma, is in accord with the result reached in similar cases in other jurisdictions. *Land Grant R. & T. Co.* v. *Coffey County* (1870) 6 Kan. 245; cf. *Carroll* v. *City of St. Louis* (1873) 67 Ill. 568. The rules of comity which enable a corporation to exercise in a foreign state all the powers which it could exercise in the state of its creation, not repugnant to the laws of nor prejudicial to the interests of the foreign state, it would seem, are not to be extended to cover the case where the corporation has no authority to do business in its own state. *Bank of Augusta* v. *Earle* (1839) 13 Peters 519. But where there is no defect in the incorporating acts, foreign corporations are permitted to carry on a lawful business authorized in their charter except so far as statutes expressly restrict their powers. *Lancaster* v. *Am. Inc. Co.* (1894) 140 N. Y. 576; see note 24 L. R. A. 322. For a discussion of the principal case in relation to Ultra Vires, see NOTES, p. 196.

CORPORATIONS—ULTRA VIRES—ACTS IN EXCESS OF CHARTER POWERS.—Plaintiff, a minority stockholder in the company, whose stock the defendant corporation attempted to secure for the purpose of creating a monopoly, brings a bill to restrain the defendant from interfering with the plaintiff's company, and to set the sale aside. *Held,* this attempt of the defendant to purchase the stock of the competing company was null and void because in excess of its chartered powers. *Dunbar* v. *American Telephone & Tel. Co.* (Ill. 1906) 79 N. E. 423. See NOTES, p. 196.

CORPORATIONS—ULTRA VIRES ACT—POWERS AS SHAREHOLDERS IN OTHER CORPORATIONS.—The charter of the G. company empowered it to take and hold stock in other corporations, in pursuance of which power it had invested in the shares of the S. company and other corporations. At a meeting of the directors of the G. company it was resolved that the shares of the S. company, held by the G. company and representing the controlling interest, be voted to increase the stock of the S. company from $100,000 to $10,000,000 and to make it a "holding" company, which should hold the controlling interest in the G. company and to whom the shares of stock in other corporations, held by the G. company, should be sold. *Held,* the proposed action would be enjoined at the suit of a minority stockholder. *Robinson* v. *Holbrook* (1906) 148 Fed. 107

The result reached is clearly correct, as the proposed plan, though not fraudulent, was found to have been unfair to the minority stockholders and was therefore in derogation of the fiduciary relationship existing between the majority and minority, *Memphis etc. Ry. Co.* v. *Woods* (1889)

88 Ala. 630, 638; Brice, Ultra Vires 732, but the court expressly bases its decision partly on the ground that the contemplated scheme of extending the scope of the S. company by means of its voting power, was beyond the chartered powers of the corporation. But the power to hold stock carries with it the incident power to vote upon the shares, *State* v. *Rohlffs* (N. J. 1890) 19 Atl. 1099; *Oelbermann* v. *N. Y. etc. Ry. Co.* (1894) 77 Hun 332, even when the intent is to control the other corporation. *Davis* v. *The U. S. Elec. etc. Co.* (1893) 77 Md. 35. Since the plan was but an exercise of this voting power it was therefore not ultra vires either in the primary sense of that term, or in the looser sense of an act requiring the consent of all the stockholders in order to be valid. Brice, Ultra Vires 47, 48, 703 et seq.

CRIMINAL LAW—FORCE OR FEAR IN ROBBERY.—The defendants, pretending to be policemen, took hold of the prosecutor, who was intoxicated, told him that he must go to jail and that it was necessary to search him before going. They thereupon went through his pockets and took some money from him. *Held,* robbery, on a charge to the jury that "it is enough that the person assaulted was intimidated and yielded up his property because of the force used and threatened, be the same ever so slight." *State* v. *Parsons* (Wash. 1906) 87 Pac. 349. See NOTES, p. 208.

CRIMINAL LAW—PUBLIC TRIAL—CONSTITUTIONAL LIMITATIONS.—Owing to the indecent nature of the testimony in a criminal trial, the court made an order excluding all from the court room except the jury, defendant's counsel, members of the bar, newspaper men, and one other person, a witness for defendant. *Held,* such order violated defendant's constitutional right to a public trial. *State* v. *Hensley* (Ohio 1906) 79 N. E. 462.

Most of the states guarantee a public trial to the accused by constitutional provision, others like New York by legislative enactment. To constitute a public trial the public must be in fact able to gain admittance with due regard to the size of the room, and the right to exclude noisy or objectionable or dangerous characters who might interfere with the proceedings or safety of the court, and the right to exclude at least the young in cases involving indecent testimony. Cooley, Const. Limit, 441. The principal case is supported by nearly all of the decisions on the point. *People* v. *Murray* (1891) 89 Mich. 276; *People* v. *Hartman* (1894) 103 Cal. 242; *People* v. *Yeager* (1897) 113 Mich. 228. In New York, however, the courts, influenced by the spirit of legislative enactment, permit the exclusion of all the public in indecent cases if the friends of the defendant are present. *People* v. *Hall* (1900) 51 App. Div 57, the view of this New York case seems a more desirable interpretation of such provisions than that of the principal case.

CRIMINAL LAW—ROGUES' GALLERY—PHOTOGRAPH BEFORE CONVICTION.—The plaintiff was under arrest for a felony, but had not yet been tried. The public officials had photographed him and were about to place his photograph in the rogues' gallery, and to send copies to various other rogues' galleries. The plaintiff, although arrested a number of times, had never been convicted. *Held,* an injunction would be granted ordering the destruction of the photographs and the photographic plates. *Itzkovitch* v. *Whitaker* (La. 1906) 42 So. 228.

The court's decision that a photograph cannot be taken of an arrested person before conviction unless for the identification of a hardened criminal would seem unsupportable. While it is true that in the Molineux case the photograph was taken after a verdict of guilty, yet the action for the destruction of the photograph was brought after this verdict had been reversed on retrial. The court refused an injunction. *In re Molineux* (1904) 177 N. Y. 395. Photographing arrested persons may be reasonably necessary for the protection of the public, *People* v. *York* (N. Y. 1899) 27 Misc. 658, and would seem to be a proper exercise of the police power whether done before or after conviction. But see **Freund,** Police Power 102.

DOMESTIC RELATIONS—ALIMONY—MODIFICATION OF DECREE.—A statute provided that the court awarding a divorce decree might make such subsequent changes in relation to the maintenance of the parties as the circumstances might warrant, or as were deemed expedient. The trial court granted a new trial, and the plaintiff appealed on the ground that the original award should have been modified. *Held,* that false swearing on the part of the defendant as to the amount of his property is no ground for modification of the decree against him for alimony. *Graves* v. *Graves* (Ia. 1906) 109 N. W. 707.

The prevailing interpretation, which limits the modification of alimony decrees under statutory provision to cases where the circumstances of the parties have changed since the rendering of the decree, is qualified by dicta in some jurisdictions leaving the question open in the case of a decree procured by perjured testimony. *Wilde* v. *Wilde* (1873) 36 Iowa 319, 322; *Ferguson* v. *Ferguson* (1900) 111 Iowa 158; *Sembrow* v. *Sembrow* (1876) 23 Minn. 214; *Straus* v. *Straus* (1891) 14 N. Y. Supp. 671. Although probably the only direct adjudication in point is in accord with the principal case, *Griswold* v. *Griswold* (1903) 111 Ill. App. 269, it seems that under these facts an exception to the general rule in regard to perjured testimony would best subserve the purpose of the statute.

DOMESTIC RELATIONS—ESTOPPEL OF MARRIED WOMEN—FRAUDULENT REPRESENTATIONS OF DISCOVERTURE.—In an action of trespass to try title, the appellants claimed, as one of the links in their chain of title, under a deed given in pursuance of authority vested by a power of attorney which recited that the grantor was a feme sole. As a matter of fact the grantor was a married woman. *Held,* that the feme covert was estopped to deny the recitals in the deed as against an innocent purchaser who relied on the deed. *Jones Estate* v. *Neal* (Tex. 1906) 98 S. W. 417.

While there is no reason why, in jurisdictions which have conferred upon married women the right to contract as if sole, estoppel should not operate against a feme covert, *Dingens* v. *Clancey* (1876) 67 Barb. 566, yet in those jurisdictions, such as Texas, in which the common law disabilities of married women have been only partially removed, it is a very difficult question to decide whether estoppel should or should not be invoked in such a way as to indirectly enforce a deed which is void, and thus enlarge the capacity of married women to contract beyond that actually conferred by the Legislature. See Ewell's Leading Cases, Infancy and Coverture 315. The doctrine of the principal case represents the weight of authority, 2 Pomeroy Eq. Jur. § 814, and perhaps the more sensible view.

EQUITY—SPECIFIC PERFORMANCE—CONSIDERATION IN ANTENUPTIAL CONTRACTS.—In contemplation of plaintiff's marriage, his father, in a covenant to which plaintiff, his intended bride, and her parents were parties, covenanted to leave at his death to plaintiff one-fourth of his estate. A codicil to his will provided that the plaintiff's share was to be held in trust for him by defendant. Defendant being in possession under decree of the Surrogate, plaintiff brings this action for specific performance. *Held,* there was sufficient consideration, and specific performance would be granted. *Phalen* v. *U. S. Trust Co.* (1906) 186 N. Y. 178. See NOTES, p. 203.

EQUITY—SPECIFIC PERFORMANCE—EXTENSION OF SUPERVISORY JURISDICTION.—By a contract in writing the trustees of a school district employed the plaintiff to teach a school. She presented herself three days late and the trustees refused to perform, having engaged a third person in her stead. *Held,* that the plaintiff's delay was not material, and that her remedy was by injunction, there being no adequate remedy at law. *Turner* v. *Hampton* (Ky. 1906) 97 S. W. 761. See NOTES, p. 204.

EQUITY—SPECIFIC PERFORMANCE—ORAL CONTRACT TO CONVEY HOMESTEAD.—Plaintiff's father for consideration contracted orally to convey

the family homestead to plaintiff, and at the same time his mother for separate consideration executed and delivered to him a quit-claim deed of the property. After plaintiff had been in possession for years ejectment was brought by a brother and sister, claiming portions of the homestead, and plaintiff filed a bill to quiet his title. *Held,* Hooker, J. dissenting, that under the constitutional provision that the alienation of the homestead must be by joint instrument of husband and wife, no contract was created enforceable in equity. *Lott* v. *Lott* (Mich. 1906) 109 N. W. 1126.

An oral contract by husband and wife to convey the homestead will not be enforced although there has been part performance. *Ring* v. *Burt* (1869) 17 Mich. 465; but see contra *Grice* v. *Woodworth* (1904) 10 Idaho 469. The question is how far the jurisdiction of equity to specifically perform parol contracts relating to land is limited by the principle underlying the homestead law, that the interests of the wife shall be most jealously guarded. Where the assent of the wife is evidenced in writing by a quit-claim deed, as in the principal case, the refusal to grant specific performance seems unwarranted.

INSURANCE—MUTUAL BENEFIT SOCIETY—SUICIDE.—A member of a fraternal benefit society committed suicide while sane. His beneficiary sued the society for the benefit. *Held,* the beneficiary could recover. *Grand Lodge* v. *Beaty* (Ill. 1906) 79 N. E. 565.

In Illinois and some other jurisdictions an insured's estate cannot recover when he has committed suicide while sane, that not being one of the contemplated risks. *Supreme Lodge* v. *Kutscher* (1897) 72 Ill. App. 462; *Ritter* v. *Ins. Co.* (1898) 169 U. S. 139; *Smith* v. *N. B. Soc.* (1890) 123 N. Y. 85. When, however, the policy is in favor of a beneficiary, the latter takes a vested right which cannot be destroyed by the suicide of the insured. *Grand Lodge* v. *Wieting* (1897) 168 Ill. 408. Since the beneficiary of a member of a mutual benefit association takes no vested interest, *Middeke* v. *Balder* (1902) 198 Ill. 590; *Shipman* v. *Protected Home Circle* (1903) 174 N. Y. 398, the principal case must rely on other grounds than vested interests. The decision reaches its conclusion because of the combined injustice to the insured and the beneficiary of an opposite result. The same injustice would seem to be present in *Supreme Lodge* v. *Kutscher, supra.* Of the six cases relied on by the court only two are in point.

INTERSTATE COMMERCE—COMMON LAW LIABILITY OF INTERSTATE CARRIER.—The plaintiff was charged an excessive rate for the carriage of an interstate shipment of freight over the defendant railroad. This suit was brought to recover the excess charges paid, the suit being based upon the common law liability of a carrier for charging unreasonable rates, and being brought in the state court. *Held,* that interstate carriers are subject to the common law and that a recovery under the common law may be had against them in a state court. *Halliday Milling Co.* v. *Louisiana & N. W. R. Co.* (Ark. 1906) 98 S. W. 374. See NOTES, p. 199.

MUNICIPAL CORPORATIONS—DEBT LIMIT—SPECIAL FUND.—The village of East Moline made a contract for the construction of a waterworks system, issuing bonds to cover the expense, payable out of the net revenue and out of a special tax of 1 per cent. per year, expressly authorized by the legislature. Its constitutional debt limit had already been reached. *Held,* this was an incurring of indebtedness within the meaning of the constitution and therefore void. *Village of East Moline* v. *Pope* (Ill. 1906) 79 N. W. 587.

As to what is indebtedness in such cases there is a great conflict of authority. The principal case is clearly right under the strict construction of the Illinois courts. *City of Springfield* v. *Edwards* (1877) 84 Ill. 626. In some states, however, a debt payable out of the current revenue for current expenses is not included within the term "indebtedness,"

Grant v. *City of Davenport* (1873) 36 Ia. 396, nor is an obligation under a "continuing contract" where payments are to be paid at stated periods out of the current revenue, each payment conditioned on performance during one period. *Valparaiso* v. *Gardner* (1884) 97 Ind. 1. The principal case does not come within either exception because there is no "current expense" to bring it under the first rule, or payments conditioned on part performance to bring it under the second. Nor does the rule in assessment cases apply, because of the distinction between an assessment and a tax.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE.—The plaintiff, with bundles in his arms and in a hurry to get home, was walking fast over a sidewalk defective to his own knowledge, when his comparion stepped on a loose board which flew up and tripped the plaintiff, his attention being diverted from the danger by a conversation with his companion. *Held,* the plaintiff was guilty of contributory negligence as a matter of law. *Hodge* v. *St. Louis* (Mich. 1906) 109 N. W. 252.

A pedestrian may use a sidewalk which he knows to be defective without being guilty of negligence. Burdick, Torts 438; *Crites* v. *New Richmond* (1897) 98 Wis. 55; *Dundes* v. *Lansing* (1889) 75 Mich. 499. The question is whether plaintiff acted as a reasonable man. *Thomas* v. *Tel. Co.* (1868) 100 Mass. 156; *Maultby* v. *Leavenworth* (1882) 28 Kan. 745. This, owing to the peculiar facts in each case, is generally a question for the jury, *Mathews* v. *Cedar Rapids* (1890) 80 Ia. 459; *Bullock* v. *N. Y. C.* (1885) 99 N. Y. 654; *McQuillan* v. *Seattle* (1895) 10 Wash. 464; rarely for the court, *Robb* v. *Connellsville* (1890) 137 Pa. St. 42; *Fox* v. *Glastenbury* (1860) 29 Conn. 204, and then only when reasonable men must honestly draw the same conclusion as to the character of the plaintiff's act. *Ry. Co.* v. *Ives* (1892) 144 U. S. 408; *Farrell* v. *Ry. Co.* (1891) 60 Conn. 239. The argument of the court that there can be no recovery where the plaintiff's attention is diverted by that which causes his danger is an insufficient reason for taking the case from the jury. *Fort Wayne* v. *Breese* (1889) 123 Ind. 581; *Troxel* v. *Vinton* (1889) 77 Ia. 90.

MUNICIPAL CORPORATIONS—HIGHWAYS—OBSTRUCTIONS—CIVIL LIABILITY OF ABUTTER.—The plaintiff was injured by the overturning of a buggy by a heap of compost placed by the abutting owner at the side of the road off the beaten path and kept there for four months. *Held,* the abutter was not liable. *Sweet* v. *Perkins* (1906) 101 N. Y. Supp. 163. See NOTES, p. 206.

MUNICIPAL CORPORATIONS—SEWERS—LIABILITY FOR DAMAGES.—Plaintiff's premises were flooded by the backing up of a trunk sewer, originally large enough, but later overtaxed by the addition of lateral connecting sewers. *Held,* the additions being made by the officers as agents of the state, and the defect being one of design, the city was not liable. *Davis* v. *City of Bangor* (Me. 1906) 64 Atl. 617.

Though a municipal corporation was always liable for negligence in constructing and maintaining sewers, as being a ministerial function, *Boston* v. *City of Syracuse* (1867) 36 N. Y. 54; *Thurston* v. *City of St. Joseph* (1873) 51 Mo. 510, the earlier cases held it exempt for any negligent defect in the adoption of a plan, as being a legislative or quasi-judicial function. *Child* v. *Boston* (1862) 4 Allen 41; *Johnston* v. *District of Columbia* (1886) 118 U. S. 19. Exceptions were then made in the case of a direct trespass by flooding, *Ashley* v. *City of Port Huron* (1877) 35 Mich. 296; *Weir* v. *Madison* (1881) 75 Ind. 241; *Seifert* v. *City of Brooklyn* (1886) 101 N. Y. 136, or a nuisance, *Reid* v. *City of Atlanta* (1884) 73 Ga. 523; *Brayton* v. *Fall River* (1873) 113 Mass. 218. The latest rule announced by some courts, holding the city liable for the adoption of the plan, *Rice* v. *City of Evansville* (1886) 108 Ind. 7; *May* v. *Thompson* (1874) 29 Ark. 569; *Spangler* v. *City of San Francisco* (1890) 84 Cal. 12; *City of Beatrice* v. *Leary* (1895) 45 Neb. 149, 159, is

preferable because of the modern tendency to hold municipal corporations liable and the absurdities sometimes resulting from attempting to distinguish between the adoption of a plan and its execution. The other ground of the decision is also objectionable, for the test as to whether officers are exercising a governmental function should not be the method of appointment or source of compensation, but the nature and purpose of the power conferred and benefit resulting. *Bailey* v. *Mayor of New York* (1842) 3 Hill 531; *Barnes* v. *District of Columbia* (1875) 91 U. S. 540; *City of Detroit* v. *Corey* (1861) 9 Mich. 165, 184; *contra, Child* v. *Boston, supra; Hill* v. *Boston* (1872) 122 Mass. 344.

NEGOTIABLE INSTRUMENTS—CONSTRUCTION—NOT PAYABLE OUT OF PARTICULAR FUND.—Defendant was sued on the following instrument accepted by him: "Pay to the order of the First National Bank on account of contract between you and the Snyder Planing Mill Co., $1500. (Signed) The Snyder Planing Mill Co." Through the default of the drawer only part of this sum became due on the contract. *Held,* the instrument was a bill of exchange payable absolutely. *First National Bank of Hutchinson* v. *Lightner* (Kans. 1906) 88 Pac. 59.

Where a particular fund is indicated by the drawer, so that the drawee is not at liberty to pay from any other, the instrument is not a mercantile one; *Jenney* v. *Herle* (1724) 2 Ld. Raym. 1361; *Brill* v. *Tuttle* (1880) 81 N. Y. 454; *Gerow* v. *Riffe* (1887) 29 W. Va. 462; but if it merely suggests a fund out of which the drawee may reimburse himself, it remains negotiable. *Macleed* v. *Suee* (1727) 2 Stra. 762; *Kelley* v. *Brooklyn* (N. Y. 1843) 4 Hill 263; *Nichols* v. *Ruggles* (1884) 76 Me. 25. Such provisions are also construed as mere statements of the consideration, *Griffin* v. *Weatherby* (1868) L. R. 3 Q. B. 753; *Hillstrom* v. *Anderson* (1891) 46 Minn. 382, even though it be executory. *Siegel* v. *Chicago Trust etc. Bank* (1890) 131 Ill. 569; *contra, Jervis* v. *Wilkins* (1841) 7 M. & W. 410; *Considerant* v. *Brisbane* (N. Y. 1857) 14 How. Pr. 487. The principal case is put on both grounds. While some cases have reached the opposite results on similar facts, *Ehricleos* v. *DeMill* (1878) 75 N. Y. 370; *Hoagland* v. *Erck* (1881) 11 Neb. 580; *Mungle* v. *Shannon* (1874) 61 N. Y. 251, yet the principal case is to be commended as construing the grantor's ambiguous words most strongly against him. *Sylvester* v. *Staples* (1858) 44 Me. 496; *Corbett* v. *Clark* (1878) 45 Wis. 403.

NEGOTIABLE INSTRUMENTS—INTERPRETATAION OF IRREGULAR INDORSEMENT.—The payee of a note executed by three makers made an indorsement whereby she acknowledged herself a principal maker, and as such principal acknowledged her liability was joint with one of the signers, at the same time delivering the note to the plaintiff. The plaintiff sued the defendant, one of the makers, reciting the death of the other two makers. On demurrer, *held,* the acknowledgment of the payee of joint liability would be disregarded, and the legal effect of the indorsement was that of an indorsement in blank. *Kistner* v. *Peters* (Ill. 1906) 76 N. E. 311.

Since a party may become a joint maker of a note regardless of the position of the signature on the paper, provided there is satisfactory evidence of an intention to become such, *Lincoln* v. *Hinzey* (1869) 51 Ill. 435; *Palmer* v. *Grant* (1822) 4 Conn. 389, 400; *Schmidt* v. *Schmaelter* (1870) 45 Mo. 502, it would seem that, in the principal case, the intention of the payee to become a joint maker being clearly expressed in writing and signed, such intention should not be disregarded; and, accordingly, unless the signature to the agreement to become a joint maker could also be considered as a signature for indorsement, as was the apparent intention, the note would be a nullity, being a note payable to maker without indorsement. 1 Daniel, Neg. Inst. § 130; *Pickering* v. *Cording* (1883) 92 Ind. 306. The conclusion of the principal case is perhaps a desirable one, but the reasoning is illogical and unsatisfactory.

PLEADING AND PRACTICE—AMENDMENT—AMOUNT IN CONTROVERSY—JURISDICTION.—The plaintiff brought his action for less than $1000 in

a court, the jurisdiction of which was restricted to causes in which the amount in controversy was less than $1000. Just before trial, however, an amendment was allowed increasing the amount claimed above that sum. *Held,* that where a court had rightfully obtained jurisdiction it could retain it notwithstanding such an amendment. *Ft. Worth etc. Ry. Co.* v. *Underwood* (Tex. 1906) 98 S. W. 453.

An amendment, centainly if it does not constitute a new cause of action, is regarded as a continuation of the original pleading, and takes effect as of the date when the latter was filed. *Fame Ins. Co.* v. *Thomas* (1882) 10 Ill. App. 545. Therefore, Statutes of Limitations are arrested as regards the amendments, at the date of filing the original pleading, *Elting* v. *Dayton* (1893) 67 Hun 425; *I. & G. Ry. Co.* v. *Irvine* (1885) 64 Tex. 529, and an amendment increasing the amount claimed to that required for appeal relates back and gives the right of appeal, *Danielson* v. *Andrews* (1822) 1 Pick. 156, and a mistake in stating the amount claimed below that required to give the court jurisdiction is cured by amendment after demurrer for want of jurisdiction. *McDannell* v. *Cherry* (1885) 64 Tex. 177. It would seem also to follow that the amendment in the principal case by relation back would make the increased claim the original one, and thus oust the court of jurisdiction.

PLEADING AND PRACTICE—AMENDMENT—CHANGING CAUSE OF ACTION.—To a complaint based on a special contract an amendment at the trial was introduced adding a common count. *Held,* such amendment was permissible as it did not change the cause of action. *Casady* v. *Casady* (Utah 1906) 88 Pac. 32.

While most courts, under the Reformed Procedure, do not permit an amendment at the trial changing the cause of action, *Talbot* v. *Garretson* (1897) 31 Ore. 256; see *Brown* v. *Leigh* (1872) 12 Abb. Prac. N. S. 193, they are in great conflict as to what constitutes such a change, some holding that it must not be from law to equity or tort to contract, *Gates* v. *Paul* (1903) 117 Wis. 170; *Hackett* v. *The Bank etc.* (1881) 57 Cal. 335, others, that it must not be "a substantial change of the claim." *Whitmire* v. *Boyd* (1898) 53 S. C. 315. Since, on principle, the cause of action is the primary right relied upon by the plaintiff, *South Bend Chilled Plow Co.* v. *George etc. Co.* (1900) 105 Wis. 443, an amendment in quasi-contract to a complaint in contract is objectionable, see *Wood* v. *Folsom* (1860) 42 N. H. 70; *Merrill* v. *Russell* (1841) 12 N. H. 74, for in contract the primary right is the right to have a contract performed, while in quasi-contract it is the right of restitution for value unjustly retained by the defendant. Nearly all courts, however, allow an amendment of a common court to an action on a contract, *Vaugh* v. *Rugg* (1879) 52 Vt. 235; *Grey* v. *Bass* (1871) 42 Ga. 270, either because of a confusion between primary and remedial rights, see *Trescott* v. *Baker* (1857) 29 Vt. 459; *King* v. *Dudley* (1893) 113 N. C. 167, or on the ground that because the fundamental rule of code pleading is to set out the facts without regard to their legal effect, the cause of action in the amendment is covered by the complaint, as in the principal case, thus forgetting that the cause of action must be determined by the complaint. *Austin* v. *Rawdon* (1870) 44 N. Y. 63; *Supervisors etc.* v. *Decker* (1842) 30 Wis. 624.

PLEADING AND PRACTICE—LIMITATIONS OF ACTIONS—PART PAYMENT—JUDGMENT.—In an action upon a judgment, the plaintiff relied upon a part payment to toll the Statute of Limitations. *Held,* since the action was not upon a contract, the bar was not removed. *Olson* v. *Dahl* (Minn. 1906) 109 N. W. 1001.

While the conception of a judgment as a true contract, originated by Blackstone, 3 Bl. Com. 160, and followed by some courts, *Taylor* v. *Root* (1868) 4 Keyes 344; *Sawyer* v. *Vilas* (1846) 19 Vt. 43, has been generally repudiated, *O'Brien* v. *Young* (1884) 95 N. Y. 428; *Louisiana* v. *Mayor of New Orleans* (1883) 109 U. S. 285, the question remains as to whether a judgment is a contract within the meaning of statutory

clauses providing for "actions founded on contract" or "contracts express or implied." If the statute impliedly uses as a basis of classification actions *ex contractu* and *ex delicto,* as set-off and attachment statutes do, judgment should be included as contracts. *Town of Edenton* v. *Wool* (1871) 65 N. C. 379; *Katzenstein* v. *Gaston R. R. Co.* (1881) 84 N. C. 688. The tolling clause of many Statutes of Limitations, because of their general *ex contractu* language and basis of classification, see 9 Geo. IV, c. iii, would, therefore, at first glance seem to include judgments. This result is erroneous, however, in any statute following the old Statute of James, because the tolling clause should be read in connection with the barring clause and be coextensive with it, when the same general *ex contractu* language is used in both, and because the barring clause should not include judgments, but be included in the excepted clause of specialties to which judgments are closely analogous. Acknowledgments and part payment under such statutes, therefore, are inapplicable to judgments. *Neblack* v. *Goodman* (1879) 67 Ind. 174; *McDonald* v. *Dickson* (1882) 87 N. C. 404; *contra, Carshore* v. *Huyck* (1849) 6 Barb. 583.

QUASI CONTRACT—TAKING OF PROPERTY CREATED IN VIOLATION OF TRUST AND CONFIDENCE.—The plaintiff having contracted to paint a portrait of defendant's deceased wife, from photographs delivered to him by defendant, painted two portraits. The defendant accepted and paid for one. The plaintiff offered to sell him the other, which defendant kept, refused to pay for, and offered to destroy. *Held,* that as the painting of the second portrait was a breach of the contract, and of trust and confidence, plaintiff acquired no property in it, and therefore could not recover. *Klug* v. *Sheriffs* (Wis. 1906) 109 N. W. 656.

The defendant could obtain an injunction ordering the use of the portrait restrained. *Tuck and Sons* v. *Priester* (1887) L. R. 19 Q. B. Div. 629; *Pollard* v. *Photographic Co.* (1888) L. R. 40 Ch. Div. 345; *Morrison* v. *Moat* (1851) 9 Hare 241; *Woolsey* v. *Judd* (N. Y. 1855) 4 Duer 379. He was merely enforcing his right to have the use of the portrait restrained. That he was not appropriating it to his own use is shown by his willingness to have the portrait destroyed. On this ground the decision of the court seems correct. But the ground on which the court bases its decision is of at least doubtful soundness. The cases cited do not maintain the position, nor does any case go so far as to deny that a man has property in a chattel which he has so created. If the ground taken by the court be true, the portrait would not be a subject of larceny; nor could plaintiff object if defendant should appropriate the portrait and hang it on his wall, or sell it to a third party.

REAL PROPERTY—BOUNDARIES—PAROL AGREEMENT.—Plaintiff and defendant held under deeds, but for over forty years had considered a certain line as the boundary, and had occupied adversely their respective parcels. The parties orally agreed to determine the original line, and when surveyed, the plaintiff, who was given some of defendant's land thereby, attempted to take possession after oral permission to do so. Being resisted, he brings ejectment. *Held,* the plaintiff can recover the land within the line as surveyed. *Roberts* v. *Birks* (Ill. 1906) 79 N. E. 103.

Where a boundary is uncertain and indefinite, an agreement by the parties settling the line is binding on them, *Sawyer* v. *Fellows* (1833) 6 N. H. 107, on the ground that it furnishes conclusive evidence as to what the true line is. *Sparhawk* v. *Vullard* (Mass. 1840) 1 Met. 95; *Hills* v. *Ludwig* (1889) 46 Oh. St. 373. Where the line is in effect settled, an agreement cannot alter it, as this would be changing the title to land by parol. *Miller* v. *Glann* (1879) 63 Ga. 435. As in the principal case it was certain that a definite line had been established by adverse possession, and title vested thereby, the court should not have permitted the parol agreement to alter it. *Vosburgh* v. *Teator* (1865) 32 N. Y. 561; *Davis* v. *Townsend* (N. Y. 1851) 10 Barb. 333; *Terry* v. *Chandler* (1857) 16 N. Y. 354. This case is to be distinguished from those where there was no

adverse possession because no claim, *Kinder* v. *Milner* (1889) 99 Mo. 145; *Smith* v. *Roberts* (Cal. 1885) 9 Pac. 154, where there is estoppel because of improvements made, *Corkhill* v. *Landers* (N. Y. 1865) 44 Barb. 218, and where the Statute of Limitations has sanctioned the line, *Kerr* v. *Hitt* (1874) 75 Ill. 51, in all of which the line is upheld.

REAL PROPERTY—DEFEASIBLE FEES IN IOWA.—One M. executed a deed to a railroad, to whose rights the defendant succeeded, the deed providing that if the premises were not used for railroad purposes, the right of way was to revert to M. The latter subsequently conveyed all her land to the plaintiff's father, excepting "the strip heretofore deeded" to the railroad, and the plaintiff claimed through the other heirs of his father under a deed excepting "the right of way." The railroad later abandoned the right of way. *Held,* the plaintiff had no title to the strip. *Spencer* v. *Railway Co.* (Ia. 1906) 109 N. W. 453. See NOTES, p. 198.

REAL PROPERTY—EJECTMENT—TELEPHONE WIRE OVER LAND.—The defendant stretched a telephone wire over plaintiff's land, supporting the wire by structure entirely outside of plaintiff's lot. The plaintiff brought ejectment, which the defendant contended was not the proper remedy. *Held,* ejectment would lie, since the plaintiff was ousted from part of his land. *Butler* v. *Frontier Tel. Co.* (1906) 186 N. Y. 486.

For a discussion of the authorities and principles applicable to these facts see the comment on the case in the lower court in 6 COLUMBIA LAW REVIEW 206, supporting the decision now affirmed.

REAL PROPERTY—LEASE OF PUBLIC LANDS.—In a jurisdiction where the state constitution provides that "no portion of" school lands "shall be sold otherwise than at public sale," a statute was passed authorizing the land commissioner, on payment of a fee, to issue a license allowing the holder to enter on land therein described and prospect for ore by sinking test pits, with a right to receive, on his application within one year, a mining lease for 50 years, under which a minimum and contingent royalty was to be paid. But this statute did not provide for the public sale of these "leases"; and their validity was attacked on the ground that they were really "sales" not made publicly, as required by the constitution. *Held,* they were valid. *State* v. *Evans* (Minn. 1906) 108 N. W. 958.

In a jurisdiction where the code had provided for leases of school lands by county supervisors, but had not provided for sales of such lands, the supervisors brought an action to enjoin from waste a lumber company which was the assignee of a 99-year term of timber lands leased under provisions of the code, the lumber company having declared its intention to cut and sell the trees on the land. *Held,* with one dissent, the injunction should issue. *Moss Point Lumber Co.* v. *Board of Supervisors* (Miss. 1906) 42 So. 290. See NOTES, p. 201.

REAL PROPERTY—RULE IN SHELLEY'S CASE—RESTRAINT ON ALIENATION.—A deed gave a fee simple estate "to have and to hold said land unto the said Susan D. Berry and the heirs of her body begotten by my said son, without the power, nevertheless, to alienate or otherwise dispose of said land until the youngest child begotten of her by my said son shall have arrived at twenty-one." *Held,* "the deed was not within the Rule in Shelley's Case; the granting clause vested in her the fee-simple title" and the habendum clause operated "to give a remainder estate to her said children, provided she died without having conveyed it as authorized by the terms of the deed." "The restraint on alienation was not void, it being necessarily limited to the life of Mrs. Berry." *Berry* v. *Spivey* (Tex. 1906) 97 S. W. 511.

In Texas the use of words of procreation in connection with the word "heirs" may aid the court in determining that "children" and not "heirs" are intended. *Simonton* v. *White* (1899) 93 Tex. 50; *Millett* v. *Ford* (1886) 109 Ind. 159. While a restraint on alienation during the

life estate of the first taker, *Wallace* v. *Campbell* (1889) 53 Tex. 229, especially if she be a married woman, *Monday* v. *Vance* (1899) 92 Tex. 428, is valid, yet if, as in the principal case, the first taker be given an estate in fee, a retraint on alienation, even though limited as to time, is void. *Bouldin* v. *Miller* (1894) 87 Tex. 359; *Mandlebaum* v. *McDonell* (1874) 29 Mich. 78. Therefore, the principal case is wrong, *Simonton* v. *White, supra,* as are also, probably, the statements that "there is no necessary repugnance between the granting and habendum clauses of this deed," if we accept the court's construction of them, *Winter* v. *Gorsuch* (1878) 51 Md. 180; Elphinstone, Interpretation of Deeds 217, 218, and that the restraint on alienation was "necessarily limited to the life of Mrs. Berry"—for how could a will, apparently one of the modes of "otherwise disposing" of the land by her, take effect if she died leaving a minor child? The assumption of the court, also, that the gift over upon her failure to dispose of her fee in her lifetime was valid, is hardly supportable. *Wead* v. *Gray* (1883) 78 Mo. 59, and other cases cited in § 74 *a* of Gray's Restraints on Alienation.

SALES—UNPAID VENDOR—PASSING OF TITLE ON DELIVERY.—The plaintiff agreed to deliver in the defendant's lumber yard the output of his lumber mill, the planks to be delivered as they were sawed. Payment was to be made at the end of every fifteen days for all lumber delivered during those days. It was expressly stipulated that immediately on delivery of any lumber title should at once vest in the buyer. *Held,* the contract provided for a sale for cash on delivery and title to the lumber delivered did not vest in the defendant till payment. *Strother* v. *McMullen Lumber Co.* (Mo. 1906) 98 S. W. 34.

In a sale for cash on delivery there is authority for the proposition that payment is a condition precedent to the passing of title, Benjamin, Sales, 7th Am. ed.; 299 and cases cited, and this condition is not waived by a mere delivery. *Dows* v. *Dennistoun* (1858) 28 Barb. 393. Where there is to be a continuous delivery as in the principal case and payment is specified to be made after a definite time within which the continuous delivery is to take place, the contract might well he held to provide for cash on delivery, *Henderson* v. *Lauck* (1853) 21 Pa. St. 359, the condition of prepayment not being waived by delivery, which would be merely for convenience. The presence, however, of an express provision that title shall pass must make the sale one for credit, title passing on delivery, *Bell* v. *Farran* (1866) 41 Ill. 400, or if by a strained construction the sale be considered one for cash, since the intention of the parties as to the passage of title when expressed should overrule ordinary considerations, *Shealy* v. *Edwards* (1882) 73 Ala. 175, must negative any condition of prepayment. In view of the presence of such a stipulation in the principal case the decision is indefensible.

TAXATION—TRANSFER TAX—INSURANCE POLICY.—The appellant had levied a tax upon the life insurance policy of the appellee's testator, a citizen of New Jersey, under Laws of New York in 1896, ch. 908, § 220 sub. 2, which imposed a tax when the transfer was by will or intestate law of property within the state and the decedent was a non-resident of the state at the time of his death. The tax was payable at the New York office of the insurance company. The insurance company had been admitted to do business in New Jersey on condition of submitting to suit by a service upon a designated New Jersey official. The company had sufficient property in New Jersey to pay the policy. *Held,* the tax was invalid. *Comptroller* v. *Gordon* (1906) 186 N. Y. 471.

This case can be distinguished from those New York cases where a tax was levied upon the stock of a domestic corporation owned by a non-resident decedent, *Matter of Bronson* (1896), 150 N. Y. 1, or upon money deposited in a bank, *Matter of Houdayer* (1896) 150 N. Y. 37; *Blackstone* v. *Miller* (1903) 188 U. S. 189, or margin deposited with a stock broker, *Daly* v. *Comptroller* (1905) 182 N. Y. 524, on the ground that none of

these claims could be enforced or converted into money without coming into the state, while the appellee in the principal case could enforce his claim at his option either in New Jersey or New York.

TORTS—CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN RULE—STREET RAILROADS.—The plaintiff was injured through the negligence of the defendant street railway company. It was proved that the plaintiff did not look and listen before going upon the defendant's tracks. *Held*, that the requirement as to looking and listening before crossing a steam railroad track is not applicable to persons crossing a street railroad track. *Niemyer* v. *Wash. Power Co.* (Wash. 1906) 88 Pac. 103.

The standard for ordinary care in crossing a steam railroad has come to be that one must look and listen, and a failure to do so establishes contributory negligence as a matter of law, *Elliot* v. *Ry. Co.* (1893) 150 U. S. 245; 6 COLUMBIA LAW REVIEW 472, except under extraordinary circumstances. *Davis* v. *Ry. Co.* (1872) 47 N. Y. 400. The same evidence is often held not conclusively to establish contributory negligence in street railroad accidents, upon two grounds; first, that street railroads have only easements to use highways in common with the public generally, and secondly that less danger is to be anticipated from crossing a street railroad than a steam railroad. *Tacoma Ry. Co.* v. *Hays* (1901) 110 Fed. 496; *Shea* v. *Ry. Co.* (1892) 50 Minn. 395. The first argument is considerably weakened by the fact that the public must take care to keep out of the way of the street cars, since the cars cannot leave the tracks, *McClain* v. *Ry. Co.* (1889) 116 N. Y. 459, 464; *Flewelling* v. *Ry. Co.* (1897) 89 Me. 585, 593, and the second argument, which had considerable weight in actions against horse car lines, would appear to have comparatively little at present when heavy cars are used and considerable speed is permitted. *McGee* v. *Ry. Co.* (1894) 102 Mich. 107; *Everett* v. *Ry. Co.* (1896) 115 Cal. 105; and especially *L. Hickman* v. *Ry. Co.* (1891) 47 Mo. App. 65, 70.

TRADE-MARKS AND NAMES—UNFAIR COMPETITION—PROTECTION OF DESIGNATION OF DEPARTMENT OF A BUSINESS.—The plaintiff telephone company adopted the number "888" as a call for its Trouble Department, and the number in this connection became well known to the plaintiff's patrons. Subsequently, the defendant telephone company, with intent to deceive the public and appropriate the plaintiff's business, adopted the same number for its Trouble Department, in consequence of which the plaintiff's patrons were deceived and its business was injured. *Held*, there was no ground for an injunction. *Rocky Mountain Tel. Co.* v. *Utah Ind. Tel. Co.* (Utah 1906) 88 Pac. 26.

The principal case, although "novel," comes squarely within the principle of unfair competition. The facts show a "fraudulent deception of the public to the injury of another by false representations that one's goods or business are those of that other," the fraud and false representations consisting in the use of the number "888" with the intention that it should be understood by the public in its secondary or acquired sense. 7 COLUMBIA LAW REVIEW 120; *Van Houten* v. *Houten Cocoa & Choc. Co.* (1904) 130 Fed. 600. While the court confines unfair competition to cases where one palms off his "wares" as those of another, it is difficult to support this narrow limitation in view of the protection generally afforded to business names and designations. 7 COLUMBIA LAW REVIEW 72. In principle, this protection should extend to the designation of a department of a business, where that designation has acquired a secondary meaning in relation to the business.